ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

April 15, 2004

Ms. Laura McElroy
General Counsel
State of Texas Board of Pardons and Paroles
209 West 14th Street, Suite 500
Austin, Texas 78701

OR2004-3078

Dear Ms. McElroy:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 199552.

The State of Texas Board of Pardons and Paroles (the "board") received a request for information relating to the board's Operations Training Seminar. You inform us that you have released some information to the requestor but claim that other requested information is excepted from disclosure under sections 552.101, 552.103, 552.107, 552.108, and 552.111 of the Government Code. In addition, we have received arguments from the Office of the Attorney General (the "OAG") contending that the requested information is excepted from disclosure under sections 552.101, 552.107, and 552.111. *See* Gov't Code § 552.304 (any person may submit written comments stating why information at issue in request for attorney general decision should or should not be released). We have considered all claimed exceptions and reviewed the submitted information.

Initially, we note that the board has failed to comply fully with the requirements of section 552.301 of the Government Code in requesting this ruling. Pursuant to section 552.301(e), a governmental body is required to submit to this office within fifteen business days of receiving an open records request (1) general written comments stating the reasons why the stated exceptions apply that would allow the information to be withheld, (2) a copy of the written request for information, (3) a signed statement or sufficient evidence showing the date the governmental body received the written request, and (4) a copy of the specific information requested or representative samples, labeled to indicate which exceptions apply to which parts of the documents. You inform us that the

board received this request on January 29, 2004. Fifteen business days following this date was February 20, 2004. The board did not submit an e-mail that it seeks to withhold until February 24, 2004. Thus, the board has not complied with the procedural requirements of section 552.301 with respect to this document.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with the procedural requirements of section 552.301 results in the legal presumption that the information at issue is public and must be released. Information that is presumed public must be released unless a governmental body demonstrates a compelling reason to withhold the information to overcome this presumption. *See* Gov't Code 552.302; *see also Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.–Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to section 552.302); Open Records Decision No. 319 (1982). Normally, a compelling interest exists where some other source of law makes the information confidential or where third party interests are at stake. *See* Open Records Decision No. 150 at 2 (1977).[1]

You assert that the e-mail at issue is excepted from disclosure under section 552.107 of the Government Code. However, this exception is discretionary in nature; it serves only to protect a governmental body's interests and may be waived. As such, it does not constitute a compelling reason to withhold information in this instance. *See* Open Records Decision No. 676 at 11-12 (2002) (claim of attorney-client privilege under section 552.107 or Texas Rule of Evidence 503 does not provide compelling reason for purposes of section 552.302 if it does not implicate third party rights); *see also* Open Records Decision No. 522 (1989) (discretionary exceptions in general). Thus, this e-mail may not be withheld pursuant to section 552.107 and must be released in accordance with section 552.302.

We turn now to the information that the board timely submitted. Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." You assert that the submitted videotapes are confidential under the Open Meetings Act. You inform us that:

> The Board's initial argument is that because the hearing officers and analysts are direct agents of the Board members under Chapter 508, and the Board members are not required to conduct any business related to their voting under the Open Meetings Act. [sic] It then follows under **§552.101 of the Public Information Act** that a videotape of the meeting does not constitute public information. The Board presents as specific statutory authority under Chapter 508 of the Government Code, which governs the Board's authority in these matters.

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[1]We note that the OAG does not object to release of this e-mail.

> Because the Board's hearing officers and analysts are designated agents of the Board and the Board is exempt from the Open Meetings Act, the videotaped material is excepted from the Open Meetings act by statute. Therefore, the videotape should not be released under the Public Information Act. The Board's hearing officers are direct designees of the Board under §508.281(a) of the Government Code, which states as follows:
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> > "(a) A releasee . . . is entitled to a hearing before a parole panel or a designated agent of the board under the rules adopted by the board . . . ." [Emphasis added.]
>
> The hearing officers make a final recommendation to the Board on whether to revoke the offender's parole or mandatory supervision or take other action. Board members and parole commissioners act in panels of three to make the final decision. See **§§508.0441(a)(5), 508.045(a)(3) and (c), and 508.283, Government Code.** The Board panels are exempt from the Open Meetings Act in making these decisions. See **§508.047(d), Government Code,** which states as follows:
>
> > (d) The members of a parole panel are not required to meet as a body to perform the members' duties, except to conduct a hearing under Section 508.281."
>
> The Board members, parole commissioners, and their designated agent hearing officers are protected by absolute immunity in the fulfillment of their duties in the regard. *Farrish v. Mississippi State Parole Bd.*, 839 F.2d 969, 974 (5th Circuit 1988).
>
> Because the training course for the hearing officers and analysts is designed for the designated agents of the Board members, the training course directly relates to the members' duties in the decision-making process for revocation hearings, and is specifically excepted under the Open Meetings Act. Therefore, because the videotape constitutes the training of these direct agents of the Board members, the entire videotape should be held to be confidential under the Public Information Act.

(All emphasis in original.) You do not cite, nor are we aware of, any particular provision of the Open Meetings Act that makes the information at issue confidential. *Cf.* Gov't Code § 551.104(c) (providing that "certified agenda or tape of a closed meeting is available for public inspection and copying only under a court order"). Instead, you assert that confidentiality of this information can be implied from the Open Meetings Act in general. However, this office has stated on numerous occasions that statutory confidentiality must be express and cannot be implied from an overall statutory structure. *See, e.g.,* Open Records

Decision Nos. 658 at 4 (1998); *see also* Open Records Decision No. 478 at 2 (1987) (statutory confidentiality requires express language making certain information confidential or stating that information shall not be released to the public). Because you have not cited, and we are unaware of, any law that makes the information at issue confidential, none of it may be withheld under section 552.101 on this basis.

You contend that the documents submitted as exhibits A through D and the portions of the videotapes that contain presentations by various attorneys may be withheld under the attorney-client privilege, which is encompassed by section 552.107 of the Government Code. When asserting the attorney-client privilege, a governmental body has the burden of providing the necessary facts to demonstrate the elements of the privilege in order to withhold the information at issue. Open Records Decision No. 676 at 6-7 (2002).

First, a governmental body must demonstrate that the information constitutes or documents a communication. *Id.* at 7. Second, the communication must have been made "for the purpose of facilitating the rendition of professional legal services" to the client governmental body. TEX. R. EVID. 503(b)(1). The privilege does not apply when an attorney or representative is involved in some capacity other than that of providing or facilitating professional legal services to the client governmental body. *In re Texas Farmers Ins. Exch.*, 990 S.W.2d 337, 340 (Tex. App.—Texarkana 1999, orig. proceeding) (attorney-client privilege does not apply if attorney acting in capacity other than that of attorney). Governmental attorneys often act in capacities other than that of professional legal counsel, such as administrators, investigators, or managers. Thus, the mere fact that a communication involves an attorney for the government does not demonstrate this element. Third, the privilege applies only to communications between or among clients, client representatives, lawyers, and lawyer representatives. TEX. R. EVID. 503(b)(1)(A), (B), (C), (D), (E). Thus, a governmental body must inform this office of the identities and capacities of the individuals to whom each communication at issue has been made. Lastly, the attorney-client privilege applies only to a *confidential* communication, *id.* 503(b)(1), meaning it was "not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication." *Id.* 503(a)(5).

Whether a communication meets this definition depends on the *intent* of the parties involved at the time the information was communicated. *Osborne v. Johnson*, 954 S.W.2d 180, 184 (Tex. App.—Waco 1997, no writ). Moreover, because the client may elect to waive the privilege at any time, a governmental body must explain that the confidentiality of a communication has been maintained. Section 552.107(1) generally excepts an entire communication that is demonstrated to be protected by the attorney-client privilege unless otherwise waived by the governmental body. *See Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein). Having considered your representations and reviewed the information at issue, we find that you have established that the information you seek to withhold pursuant to section 552.107

constitutes privileged attorney-client communications that may be withheld pursuant to section 552.107. As our ruling on this issue is dispositive, we need not address your other arguments regarding this information or the arguments submitted by the OAG.

You also contend that other portions of the videotapes may be withheld under section 552.111 of the Government Code. This section excepts from disclosure "an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency." The purpose of this exception is to protect advice, opinion, and recommendation in the decisional process and to encourage open and frank discussion in the deliberative process. *See Austin v. City of San Antonio*, 630 S.W.2d 391, 394 (Tex. App.–San Antonio 1982, no writ); Open Records Decision No. 538 at 1-2 (1990). In Open Records Decision No. 615 (1993), this office re-examined the statutory predecessor to section 552.111 in light of the decision in *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.–Austin 1992, no writ). We determined that section 552.111 excepts only those internal communications that consist of advice, recommendations, opinions, and other material reflecting the policymaking processes of the governmental body. *See* Open Records Decision No. 615 at 5. A governmental body's policymaking functions do not encompass routine internal administrative or personnel matters, and disclosure of information about such matters will not inhibit free discussion of policy issues among agency personnel. *Id.*; *see also City of Garland v. The Dallas Morning News*, 22 S.W.3d 351 (Tex. 2000) (section 552.111 not applicable to personnel-related communications that did not involve policymaking). A governmental body's policymaking functions do include administrative and personnel matters of broad scope that affect the governmental body's policy mission. *See* Open Records Decision No. 631 at 3 (1995). Further, section 552.111 does not protect facts and written observations of facts and events that are severable from advice, opinions, and recommendations. *See* Open Records Decision No. 615 at 5. If, however, the factual information is so inextricably intertwined with material involving advice, opinion, or recommendation as to make severance of the factual data impractical, the factual information may also be withheld under section 552.111. *See* Open Records Decision No. 313 at 3 (1982).

The information at issue consists of presentations by board members during a training seminar. You assert that "[a]ny communication between Board members during the subject training session relates directly to the policy mission of the Board of Pardons and Paroles and should be protected under the deliberative process privilege." While the information at issue may relate to the board's policy mission, it does not consist of advice, recommendations, opinions, and other material reflecting the board's policymaking processes and is instead part of a training intended to convey the board's existing policy. Because the information at issue does not pertain to the board's deliberations in shaping its policy, it is not encompassed by the deliberative process aspect of section 552.111 and may not be withheld on this basis. Because you claim no other exception with respect to these portions of the videotapes and they are not otherwise confidential by law, this information must be released.

In summary, the e-mail submitted on February 24 must be released. The board may withhold the remaining information that it has indicated is excepted from disclosure under section 552.107. All other submitted information must be released.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.–Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

Denis C. McElroy
Assistant Attorney General
Open Records Division

DCM/lmt

Ref: ID# 199552

Enc. Submitted documents

c: Ms. Yolanda Torres
P.O. Box 515
Huntsville, Texas 77342-0515
(w/o enclosures)

Ms. Karen Rabon
P.O. Box 12548
Austin, Texas 78711-2548
(w/o enclosures)